

The issue before the Board on this appeal is the nature and extent of claimant's disability. The ALJ found claimant was entitled to a work disability award because "[u]nder

the circumstances cited, the court does not find claimant's action in refusing to work overtime to be unreasonable." ¹

The ALJ further found that after his termination by respondent for refusing to work overtime, claimant made a good faith effort to find appropriate employment. As a result, claimant was awarded compensation for a 72.5 percent permanent partial disability based upon the average of his actual 100 percent wage loss and his 45 percent task loss.

Respondent disputes those findings and argues claimant failed to exercise good faith in performing his post-injury accommodated job with respondent and, after his termination, in attempting to find appropriate employment elsewhere.

Respondent contends that claimant is precluded from receiving a work disability because he was terminated for cause from an accommodated job that claimant had the ability to perform. Accordingly, claimant's permanent partial disability compensation should be limited to his percentage of functional impairment, which the ALJ determined was 21 percent to the body as a whole. In the alternative, should a work disability be awarded, respondent contends claimant's wage loss is 39 percent because a weekly wage of \$260.00 based on ability should be imputed to claimant due to his failure to make a good faith effort to find appropriate employment following his termination by respondent. In addition, claimant's task loss is 35 percent based upon the opinion of Dr. Peter Bieri, whose opinion respondent argues is the more credible. This would result in a work disability of 37 percent.

Claimant asks the Board to affirm the ALJ's Award in all respects.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

After reviewing the entire record and considering the briefs and oral arguments of the parties, the Board makes the following findings and conclusions:

Claimant's work injured his upper extremities, shoulders and neck. He was given permanent restrictions and was returned to accommodated work with respondent. Claimant was able to perform his accommodated job with respondent for a year and a half. He even worked overtime on numerous occasions during this one and a half year period. But on July 23, 2002, claimant refused to stay and work overtime even though claimant was informed that this refusal could result in his termination. Claimant told his supervisors, Brenda Haag and Rosa Pedroza, that he had a restriction from his physician against working over eight (8) hours per day. However, no such restriction existed. Claimant's supervisor checked on claimant's restrictions and advised claimant that he was not

¹ Award at 4 (Oct. 22, 2003).

restricted from working over eight (8) hours. Claimant disputed this and continued to refuse to stay and work. Claimant left the workplace. He was terminated the next day.

Respondent contends that claimant failed to perform the essential duties of his job for reasons unrelated to his injury. Claimant disputes this and further contends respondent's conduct and his termination was done in bad faith because he was in pain and unable to continue working that day. Furthermore, claimant argues that he told his supervisor that he was in pain and respondent failed to follow its own policy procedures by not sending him to the dispensary. The Board finds that claimant did not report he was in pain but only gave the purported restriction against overtime as the reason for his refusal to work. Claimant argues that he is nevertheless entitled to a work disability because his conduct was neither willful nor malicious and he did not act in bad faith.

The test of whether a termination disqualifies an injured worker from entitlement to a work disability is a good faith test on the part of both claimant and respondent.² In this case, claimant was terminated for violating respondent's policies. Although claimant disputes the factual basis for the termination, the Board finds the record fails to establish that the termination was made because of claimant's work-related injuries or in bad faith. In fact, the Board finds that the greater weight of the evidence supports a finding that claimant was capable of performing his job duties and was insubordinate as alleged. The Board concludes claimant's actions were a willful and knowing violation of the respondent's rules and policies. As such, claimant's conduct was tantamount to a refusal to perform appropriate work as in *Foult*³ or a failure to make a good faith effort to retain appropriate employment as described in *Copeland*.⁴ Accordingly, because claimant was terminated for misconduct, the wage he was earning and would have continued to earn had he continued working for respondent should be imputed to him. As this was at least 90 percent of his average weekly wage, his permanent partial general disability award is based upon his permanent functional impairment.⁵

The claimant also argues that even if he was terminated for cause from an accommodated job that was within his restrictions he remains entitled to a work disability because his termination was not in good faith. In *Niesz*⁶ the Court found that where a

² See *Helmstetter v. Midwest Grain Products, Inc.*, 29 Kan. App. 2d 278, 28 P.3d 398 (2001); *Oliver v. Boeing Company*, 26 Kan. App. 2d 74, 977 P.2d 288, rev. denied 267 Kan. 889 (1999).

³ *Foult v. Colonial Terrace*, 20 Kan. App. 2d 277, 887 P.2d 140 (1994), rev. denied 257 Kan. 1091 (1995).

⁴ *Copeland v. Johnson Group, Inc.*, 24 Kan. App. 2d 306, 944 P.2d 179 (1997).

⁵ See *Ramirez v. Excel Corp.*, 26 Kan. App. 2d 139, 979 P.2d 1261, rev. denied 267 Kan. 889 (1999).

⁶ *Niesz v. Bill's Dollar Stores*, 26 Kan. App. 2d 737, 993 P.2d 1246 (1999).

claimant's termination was not made in good faith because respondent inadequately investigated the facts relating to the termination there could still be an award of work disability. In this case, however, respondent conducted an adequate investigation of the facts. In addition, as supported by the later deposition of the authorized treating physician, Dr. Edward J. Prostic, no restrictions against working over eight (8) hours per day existed on the date in question. Accordingly, the evidence shows that respondent did not act arbitrarily or in bad faith. The fact that Dr. Prostic later restricted claimant to an eight (8) hour workday does not change the fact that claimant tried to mislead respondent on the date in question when he refused to work overtime.

Claimant was terminated for cause from an accommodated job which was within his restrictions. Accordingly, the post-injury wage claimant was earning with respondent before his termination will be imputed to him. As this wage was more than 90 percent of the average weekly wage claimant was earning at time of this accident, he is precluded from receiving a permanent partial disability award in excess of the percentage of functional impairment.

The Board agrees with the ALJ's determination that claimant's functional impairment is 21 percent.

AWARD

WHEREFORE, the Award of Administrative Law Judge Brad E. Avery dated October 22, 2003, is modified as follows:

The claimant is entitled to 0.57 weeks of temporary total disability compensation at the rate of \$284.43 per week or \$162.13 followed by 87.15 weeks of permanent partial disability compensation at the rate of \$284.43 per week or \$24,788.07 for a 21 percent functional impairment to the body as a whole, making a total award of \$24,950.20, all of which is currently due and owing and is ordered paid in one lump sum less amounts previously paid.

The Board adopts the remaining orders of the ALJ in the Award not inconsistent with the above.

IT IS SO ORDERED.

Dated this _____ day of March 2004.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: Stanley R. Ausemus, Attorney for Claimant
Gregory R. Worth, Attorney for Respondent
Brad E. Avery, Administrative Law Judge
Paula S. Greathouse, Workers Compensation Director